

1916

H358.

Hedges.

The Interference Of United States With Neutral  
Trade, 1861-1865, Compared With The Present  
Policy Of Great Britain

The person charging this material is responsible for its return to the library from which it was withdrawn on or before the **Latest Date** stamped below.

Theft, mutilation, and underlining of books are reasons for disciplinary action and may result in dismissal from the University.

UNIVERSITY OF ILLINOIS LIBRARY AT URBANA-CHAMPAIGN

BUILDING USE ONLY

OCT 27 1977

L161—O-1096

THE INTERFERENCE OF THE UNITED STATES  
WITH NEUTRAL TRADE, 1861-1865,  
COMPARED WITH THE PRESENT  
POLICY OF GREAT BRITAIN.

BY

BERTRAM ATKINSON HEDGES

---

THESIS

FOR THE

DEGREE OF BACHELOR OF ARTS

IN

HISTORY

---

COLLEGE OF LIBERAL ARTS AND SCIENCES

UNIVERSITY OF ILLINOIS

1916



Digitized by the Internet Archive  
in 2013

<http://archive.org/details/interferenceofun00hedg>

1316  
H330

CRV

2 UC16

UNIVERSITY OF ILLINOIS

May 26 1916

THIS IS TO CERTIFY THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

*Benton Wilkinson Hedges*

ENTITLED *The Interference of the United States with  
Neutral Trade, 1861-1865 Compared with the  
Present Policy of Great Britain.*

IS APPROVED BY ME AS FULFILLING THIS PART OF THE REQUIREMENTS FOR THE

DEGREE OF *Bachelor of Arts in History in  
The College of Liberal Arts and Sciences  
South Western*

Instructor in Charge

APPROVED: *South Western*

HEAD OF DEPARTMENT OF *History*

16 July 20

Received of the Hon. Secy. of the  
Interior, D.C. \$100.00  
for the purchase of 1000 lbs. of  
mutton.

Received of the Hon. Secy. of the  
Interior, D.C. \$100.00  
for the purchase of 1000 lbs. of  
mutton.



THE INTERFERENCE OF THE UNITED STATES WITH  
NEUTRAL TRADE, 1831-1835, COMPARED  
WITH THE PRESENT POLICY OF GREAT BRITAIN.

CONTENTS.	Pages.
Bibliography	I & II.
Chapter I. Introduction	1-3.
Chapter II. General Remarks upon Resemblances and Differences in the Situation To-Day and that of the Civil War Period.	7-9.
Chapter III. Rules Governing the Conduct of To-Day's Belligerents.	10-14.
Chapter IV. The Right of Search and the Manner and Kinds of Evidence.	15-33.
Chapter V. Contraband and Continuous Voyage.	34-37.
Chapter VI. Blockade and Continuous Voyages.	38-53.
Chapter VII. Conclusions.	54-60.





## BIBLIOGRAPHY.

### A. Civil War Phase.

#### I. Sources.

1. Diplomatic Correspondence 1861-1866, printed 1861-1864 in Senate Executive Documents and 1864-1866 under the title of Diplomatic Correspondence.
2. Seward, W. H. Works (Edited by C. E. Baker) New York, 1853-84, 5 vols. Vol. V passim.
3. Supreme Court Decisions: Wallace, V and III.
4. London Times, 1861-1866.
5. Scott, James Brown Select Cases on International Law. St. Paul, 1906.
6. Moore, John Basset. Digest of International Law.
7. Nicolay and Hay - Complete Works of Abraham Lincoln, New York, 1905. Vol. VI passim.

#### II. Secondary Material.

1. Adams, Charles Francis. Charles Francis Adams New York, 1909 passim.
2. Adams, Charles Francis. Seward and the Declaration of Paris - Boston, 1913.
3. McCarthy, Justin. History of Our Own Times New York, 1901, Vol. II.
4. Rhodes, James Ford. History of the United States From the Compromise of 1850. 7 volumes - New York 1906 Vol. II.

### B. Modern Phase.

#### I. Sources.

1. American Journal of International Law, Supplement of July, 1915.
2. International Conciliation - published by the American Society for International Conciliation, Washington.
3. Current History (New York Times) March 1916.
4. London Times - especially Nov. 3, 1915.
5. Contemporary American Metropolitan Dailies.
6. Literary Digest, etc. of current numbers.

#### II. Secondary Material.

1. American Journal of International Law, Apr. 1915, July 1915, January, 1916 - A series of articles by J. W. Garner.
2. The Nation (New York) Current Numbers 1914-16.
3. Current History (New York Times) Dec. 1915, April 1916.
4. Nineteenth Century and Beyond (London) April 1915 page 731, following.
5. London Times, especially Nov. 3, 1915.
6. New York Evening Post, Nov. 3, 1915.
7. Literary Digest, March 4, 1916.
8. Chicago Tribune Jan. 27, 1916 and current numbers.



## BIBLIOGRAPHY CONT'D.

### C. Legal Works, etc.

1. Bentwich, N. D. M. Declaration of London,  
London, 1911.
2. Cohen, Arthur Declaration of London, 1911.
3. Hall, William E. A Treatment of International  
Law, London, 1895.
4. Lawrence, T. J. Principles of International Law,  
Boston, 1910.

D. I wish to acknowledge many valuable suggestions received from Professor J. W. Garner's Course in International Law (Political Science 6) at the University of Illinois. Professor Garner was also kind enough to lend me his unpublished manuscript on "Blockade, Contraband, and Continuous Voyage," since published in the January number of American Journal of International Law.



THE INTERFERENCE OF THE UNITED STATES WITH  
NEUTRAL TRADE, 1861-1865, COMPARED  
WITH THE PRESENT POLICY OF GREAT BRITAIN.

Chapter I.

Introduction.

On October 21, 1915, Secretary of State Lansing instructed Ambassador Page to lay before Sir Edward Grey, a note of some twenty thousand words in length. In this note long in preparation (too long many critics think), and preceded by numerous, but briefer formal protests were summed up in a formal array all the grievances which the United States had suffered, or fancied itself to have suffered, at the hands of the British navy since the outbreak of the great War. The note is now nearly six months old (April, 1916) and yet, except for a few minor and unimportant details, it still stands as a formal statement of America's position, or rather the position of President Wilson's Administration. This note was and is, according to Professor Hart, "the vigorous declaration of the intention of the United States to champion the integrity of established neutral rights against the lawless conduct of belligerents." (1) "By it," observes the New York Evening Post, "our Government will have furnished leading cases in international law." (2)

On the other hand, the London Times thinks of the same note that it "is unworthy of the better traditions of the Republic," dealing in technicalities that are still open to dispute, "as though they were settled for all time." (3)

(1) Current History December 1915.

(2) New York Evening Post, November 8, 1915.

(3) London Times, November 8, 1915.







Be this as it may, the American note of October 31 brings forward to every thinking American citizen many stupendous questions concerning the rights and duties of neutrals. We, as the most powerful neutral nation, are vitally concerned for one thing, in the question, "Just what is the basis of neutral rights, anyway?" And before we can answer that question, we must first clearly understand what we mean when we talk of "neutral nation", "neutral duties", and "neutral rights".

When the long threatening storm finally broke out in Europe, a year and a half ago, and declarations of war were handed out right and left, the family of nations became at once divided into two great classes, neutrals and belligerents. As to the latter class, so far as they themselves are concerned, it makes little difference to us legally what they may do to each other. We may, perhaps, urge them to follow certain commonly recognized principles in the conduct of their hostilities and may suggest that they kill each other decently. Yet, so long as they confine their activities to their own ranks, we, because we belong to the first class, that of neutrals, can do no more than make suggestions. There is some doubt about even this exception, as Mr. Ford, perhaps discovered.

As neutrals, we must consider first our duties, "do nothing", as a government, "to assist either or any belligerent, either with arms, or men, or money." (1)

The older theory limited neutrality to the passive or negative side. Modern practice extends the duties even further. Not only must we as a neutral government refrain from assisting

(1) Sir F. Pigott 19th Century April 1915.



either group of belligerents, but we must, if the occasion demands, even use force to prevent them from gaining aid or advantages from us. (1) No better illustration of this can be offered than a picture of the German cruisers lying, interned in our harbors, guarded by United States guns.

But what, to get back to the original question, are neutral rights, and what is their basis. "Are they", asks the Nation, "merely a gracious (or grudging) concession by belligerents, entirely at their mercy, or do neutrals base their claims upon a positive legal basis, independent of the will or whim of a country at war?" (2) It makes all the difference in the world which view we accept. It is very like the "difference between a benevolent tyranny and a guaranteed bill of rights." (3)

Naturally, the United States refuses to accept any but the latter point of view. As President Wilson pointed out in his note of October 21, we contend that neutral rights are based upon the normal state of things. Belligerent rights are the abnormal, and are limited by certain customs and precedents which civilized powers have chosen to call International Law.

One of the cherished rights of neutrals is the "right of navigation upon the high seas, which does not spring from the consent of belligerents, but from the inherent right of all maritime nations to make use of the sea as a common possession." (4)

It is in connection with this right that all our important

(1) Hall IV Chapter 1 and 4.

(2) Nation Nov. 11, 1915 : 561. Cf. New York Evening Post Nov. 8, 1915 and S.F. Piggot, 19th Century Apr. 1915

(3) Nation Ibid.

(4) A. E. Hart Current History - Dec. 1915 ; 487 Cf. American Note October 21, 1915.





disputes with Great Britain have arisen, both now and in the past. If the questions arising seem new and unprecedented, we have only to go back some fifty odd years to find the very same points of issue, fundamentally, as exist today. The world is much smaller commercially than it was during the Civil War. Telegraph cables, wireless stations, fast steamers, and the marvelous development of manufactories and industrial enterprises of every kind have enlarged the quantity of the questions of right and duty involved, but fundamentally, it is still true that "there is nothing new under the sun."

It is with the view to illustrate this truth, as well as to present the whole case in as fair a manner as possible, that this thesis is brought forward. It is not intended as an exhaustive treatise of international law or a detailed historical comparison, point by point, between the situations of 1861-1865 and today. Such a treatise would be far beyond the ability and means of the writer.

What I shall endeavor to do will be merely to single out two or three of what seem to be the big theories now in dispute, couple them with actual practice and fact and then by going back to the time when the situation was more or less reversed, endeavor to discover just how we correlated those same theories with our own practice. If, from these investigations, I may draw some conclusions as to the justice or injustice, excusable or inexcusable nature of either Britain's or our own attitude, it is not because I am either neutral or prejudiced, but because I have endeavored to interpret the whole matter as the average fair-minded man who knows something of history and has something of matter-of-factness, must





see it. I leave more learned discussions and speculation to more learned men.

From the American note of October 21, 1915, it appears that these questions are now at issue between Great Britain and the United States:

(1) the right and manner of search of neutral vessels by belligerent vessels at sea. This question also involves that of obtaining evidence and the kinds of evidence employed.

(2) the questions of contraband and the doctrine of continuous voyage.

(3) Blockade and the doctrine of continuous voyage.

(4) Transfer of flags in time of war.

(5) Misuse of neutral flags by belligerents.

(6) Armed merchantmen.

Since the publication of the note, there has been added the question of the right of a belligerent to take enemies from neutral ships. (1)

During our Civil War, practically every one of these same questions came before the diplomatic world sooner or later. In addition, there was also another which more than once brought this country to the verge of war with Great Britain. This was the matter of the English-built Alabama and other Confederate cruisers. This was, indeed, perhaps the most serious difficulty of all, but because no analogy seems to exist in our present situation, I am forced to pass over it with this bare mentioning. Then, too, there was the Trent affair, which only because of the incompleteness of the Atlantic Cable, perhaps, failed to precipitate war with

(1) Chicago Tribune April 13, 1916.



Britain, and which was nevertheless the occasion of diplomatic threats and counter-threats. This, too, I must pass over lightly, for, strange as it may seem, when we recall the Trent or the War of 1812, the present British action in taking Germans from American ships seem scarcely to have made a ripple upon the sea of diplomatic correspondence.

My entire discussion will, in fact, be confined to the first three points which I have enumerated, namely: the question of search and evidence, the question of contraband, and the question of blockade, with particular attention, in connection with the last two points, to the much-involved doctrine of continuous voyages.





## Chapter II.

### GENERAL REMARKS UPON RESEMBLANCES AND DIFFERENCES IN THE SITUATION TODAY AND THAT OF THE CIVIL WAR PERIOD.

It will be well at this moment for the reader to glance at the maps of Europe as it is today. Let us notice the importance of geographical conditions, so far as the problems of the belligerents are concerned. I am speaking with particular reference to the coast-lines of the two groups of belligerents. Look at Germany first. Here we find a coast-line, if we count the Baltic Sea (which is of less importance than the western coast because it is closed from six to seven months of the year), of from eight hundred to a thousand miles in length. If we include the small neutral countries of Denmark and Holland and also Belgium, this line is lengthened by about two hundred-fifty miles. By means of the Kiel canal, the disadvantage of the narrow entrance to the Baltic has been somewhat reduced.

Turning to Austria, the other Teutonic belligerent, and Turkey, we may add almost another thousand miles. Unfortunately for the Central powers, however, this latter fact becomes much less important when we consider the fact that both the Turkish and Austrian ports are all on the Mediterranean, which is commanded by the Entente powers at Gibraltar and Suez. In reality, then, Germany can count upon only her own coast line and that of neutral Holland and Denmark as a gateway to the world market.

Turn now to the map of the United States. Begin at the northern boundary of North Carolina and follow the coast-line





around to the Rio Grande, taking note of the harbors as you go. If we count Germany's Baltic ports and those of Holland, this coast-line of the Confederacy is about three times that of Germany. In addition to this there lies the long stretch of Mexican territory along the Rio Grande.

Here we see at once an important point of difference between the two situations which we are to compare. It is an especially important one, so far as matters and disputes commercial are concerned.

There is still another and equally important point of difference. With three times the coast-line of Germany to be blockaded, there was in 1861-1865 one of the smaller naval powers to perform the task. As a neutral shipper, there was the "Mistress of the Seas", with all her merchant marine, the greatest in all the world even in those days.

Today, Germany with only a third of the Confederacy's coast-line is confronted by not only the greatest single naval power in the world, but also by all the lesser ones of France, Italy, Russia and Japan. The United States, the most powerful neutral, is weaker in merchant marine than any of the Entente belligerents, unless it be Russia and Japan. In naval armament we rank fourth.

To put it concisely, in the Civil War, we, with a naval strength far inferior to that of Great Britain, were able to impose, let us admit, serious restrictions upon the most important commercial fleet of the world. Today, we, still with a smaller navy and a comparatively insignificant commercial fleet, are as a neutral endeavoring to check, by vigorous protests, every act



which we consider an encroachment upon our rights, by the most powerful navy and the largest merchant fleet which the world has ever seen, even when considered relatively.

It is well to keep these facts in mind throughout the following discussion. We are apt to draw analogies too closely if we do not.



## Chapter III.

## RULES GOVERNING THE CONDUCT OF TODAY'S BELLIGERENTS.

I have referred to certain rules and customs which belligerents are bound to observe in the conduct of hostilities. Before we can understand the significance of many references in the correspondence between the British and the American Governments we must know something of just what these rules and customs are based upon. Let us notice briefly, therefore, some of the more important treaties and conventions which have the greatest significance in the present relations between belligerents and neutrals.

The first of such treaties of which we may observe frequent mention in various diplomatic notes of today, is the Declaration of Paris, drawn up and ratified in 1856 by most of the belligerents of the present European struggle. It is of particular interest to us because of the part played, or rather not played, in it by the United States. By it were established four great principles of naval warfare.

(1) Privateering is and remains, abolished.

(2) A neutral flag protects enemy goods (with the exception of contraband).

(3) Neutral goods (except contraband) are not liable to capture under the enemy's flag.

(4) Blockade, to be binding, must be effective. (1)

As anyone who has only casually read contemporary history

- (1) Bentwich "Declaration of London : 3  
 U. S. Executive Documents 1861-2 I 34.  
 C. F. Adams "C. F. Adams" p. 200-1 etc.







may observe, it is the second and fourth, especially the latter, which is the most important in connection with our present discussion.

Yet, strange as it may seem, the United States is almost the only important Government which has never ratified the Declaration of Paris. Provision was made by the signatory powers to add the United States to the list of signers. Our Government refused to comply, not because she was less liberal than her sister States, but rather the contrary. Our Government has always stood for the exemption of all private property from capture at sea, whether it be owned by belligerent or neutral, on board belligerent or neutral vessel (contraband of war excepted) just as in land warfare. Our Government, therefore, refused to give up privateering unless an amendment be added, insuring all such private property against capture at sea. (1)

When the Civil War broke out, however, Seward was not long in seeing that the retention of privateering must be a much greater advantage to the Confederacy than to the North. He therefore sent out in April, 1861, a circular to our ministers in Great Britain, Russia, France, Prussia, Austria, Belgium, Italy, and Denmark declaring that "prudence and humanity combine in persuading the President, under the circumstances, to accept the lesser good offered by the Declaration of Paris without waiting for the greater one offered to the maritime nations by the President of the United States. (2)

Unfortunately for Seward's seemingly humane and considerate concession, Lord Russell, England's foreign minister, sus-

(1) Senate Exec. Docs. 1861-2, I pt. 1:41-2; Seward, Works V 192  
 (2) Seward, Works V, 194; Sen. Ex. Docs. 1861-2 I, 1:44.



pected an ulterior motive. He feared that Seward's purpose was to bind the neutral powers to exert pressure to prevent the use of privateers by the Confederacy. He therefore most unkindly insisted upon adding an amendment to the Declaration to the effect that ratification by the United States should have no bearing on the war then in progress. (1)

That Lord Russell was not far wrong in his suspicions seems almost evident from the fact that Seward at once intrusted Charles Francis Adams, our minister, to end negotiations upon the whole matter. (2) To this day we never have ratified the articles. Yet, so firmly have its principles become established that the United States has always observed them. Any attempt on our part to do otherwise would indeed "call down upon us the hostility of every neutral power and involve us probably in a war with the civilized nations." (3)

We come, now, to the Declaration of London of 1909, which, although it has never been ratified by all the present belligerents, and is therefore not legally binding, (4) has been nevertheless of considerable importance in furnishing information and data in recent diplomatic notes. (5)

This series of conventions or articles, attempting to set forth the recognized rules of maritime warfare, was drawn up at London, 1909, by representatives of the great naval powers of the world. It is necessary for our present purpose to no more than mention the main provisions. These dealt with the following points:

- (1) Seward Works V 290.
- (2) Ibid 289-91; Fuller Account - C. F. Adams "Seward & Dec of
- (3) Benturch - Declaration of London - P. 4. Paris.
- (4) Garner - Amer. Jour. Int. Law Apr. 1915:374.
- (5) Lansing to Page - Int. Corc. X, P. 6 - Amer. Note O 21 etc.





contraband, and its classification, blockade, doctrine of continuous voyages, destruction of neutral vessels before condemnation in a prize court, rules as to neutral ships rendering unneutral service, conversion of merchant ships into warships on the high seas, transfer of flags in time of war, determination of enemy property. (1) It will be remarked that there is scarcely a point enumerated that has not entered into the present difficulties.

Although, as has been said, the Declaration of London has never been ratified by all the belligerents and is therefore not binding upon them, yet when the war broke out in 1914, President Wilson caused a note to be sent to Britain, suggesting that the Declaration be adopted as a temporary code for naval warfare. (2) Great Britain promptly replied, declaring His Majesty's Government had "decided to adopt generally the rules of the declaration in question, subject to certain modifications and amendments which they judge indispensable to the efficient conduct of their naval operations." (3)

Among such "modifications and amendments", the most important deal with the subjects of conditional and absolute contraband. Thus, by its Orders in Council of October 29, 1914 (4) the British Government declared a presumption of belligerent destination to rest upon any cargo consigned "to order." There were other such ordinances earlier and later which are contrary to the spirit of the Declaration, but these are to be discussed below. I cite such an example here only to explain why, upon

- (1) Bentwich, Declaration of London - p.7.
- (2) Amer. Journal Int. Law July 1915. - p.1.
- (3) International correspondence X, - p.6.
- (4) Ibid. pages 13-14





receipt of the British note, our Government very promptly and "very properly" (1) withdrew its suggestions and insisted "that the rights and duties of the United States and its citizens in the present war be defined by existing rules of International Law and the treaties of the United States, irrespective of the provisions of the Declaration of London: and that this Government reserves to itself the right to enter a protest or demand in each case in which those rights and duties so defined are violated by His British Majesty's Government." (2)

Here then was a statement in clear-cut English that our Government did not mean to acquiesce in Britain's action in putting in force only those portions of the London Declaration which best served her ends. It was a preliminary warning, perhaps, of the broadside of "notes" which our busy President has kept up against the British Government since the outbreak of the war. The effect is that both our protests and England's defence must be based not upon the unratified and comprehensive Declaration of London, but upon our treaties, and that collection of precedents, treaties, customs, which go to make up what we call "existing rules of international law." Just what those rules are can best be illustrated in connection with each formal protest or series of protests which have appeared since the outbreak of the present war. This much may be here observed, however, that in a great many, if not a majority of the cases in hand, it is to the action of the Federal navy and prize courts of 1861-1865, that the appeal of justification is made.

(1) Garner Amer. Jour. Int. Law April 1915; 374.

(2) Lansing to Page, International Correspondence X p.6



## Chapter IV.

THE RIGHT OF SEARCH AND THE MANNER AND KINDS  
OF EVIDENCE.

Let us consider first our complaint against Great Britain in the matter of the detention and search of neutral ships. It is a general principle of international law that the belligerent warship has the right to stop and search, at any time on the high seas, any neutral merchant ships for evidence of contraband or intention to violate a blockade. So much, the United States has freely admitted.

(1) But it is also a recognized principle of international law that such search must be made at sea and captures must be made upon grounds of "evidence found on the ship under investigation, and not upon circumstances ascertained from external sources." (2)

In other words the question involves that of the manner of obtaining evidence. We contend that all such evidence should be obtained by belligerent search at sea and from the suspected ship itself. Our Government has therefore protested at the British action in the present war, alleging that "innocent vessels or cargoes are now seized and detained on mere suspicion, while efforts are made to obtain evidence from extraneous sources, to justify the detention and the commencement of prize court proceedings." (3)

The British reply to this protest, not by denying the charge, but by declaring that modern conditions, involving huge cargoes in transoceanic liners, make a search at sea impossible.

"If action had to be taken solely on such information as might be gathered by the boarding officer on his visit to the

(1) Bryan to Page - Int. Cor. X 19-20. Garner Am. J. Int. Law, April 1915; 378 : Amer. Note Oct 21, 1915

(2) 3 Wallace 9-10 (Springbok), Amer Note Oct. 21, 1915.

(3) Am. Note Oct. 21 - for a list of such cases see Ap. to note





ship, it would have been quite impossible to interfere appreciably with German imports and the Allied Governments would therefore have been deprived of the recognized belligerent right." (1) As it is, "They make use of every source of available information" to discover destination and "exercise to the full the right of stopping such goods as information showed to be suspect, while making a genuine effort and honest attempt to distinguish between bona fide neutral trade and hostile trade." To this end, a special contraband committee has been organized and "sits continually to pass on all such matters. Nearly every ship for Holland and Denmark is taken into port for examination and every item of her cargo is immediately considered in the light of all the information which has been collected from the various sources open to the Government and which, after a year and a half of war is very considerable. Any items of cargo as to which it appears that, there is a reasonable ground for suspecting any enemy destination are placed in the prize court while articles as to the destination of which there appears doubt are detained pending further investigations." In view of this practice, shippers have avoided expensive delays by making agreements with the British Government, on the general principle "that His Majesty's Government obtain the right to require any goods carried by the line, if not discharged in the British port of examination, to be either returned to this country (England) for prize court proceedings or stored in the country of destination until the end of the war or only handed to the consignee under stringent guarantee that they will not reach the enemy." (2)

The above lengthy quotation from a recent British White

(1) London Times, Nov. 8, 1915. Cf. Garner Ms. on Blockade  
 (2) British White Paper -Cur. Hist. Mar. 1916, 1102. 31-32.



paper is not a statement of theory, but of actual practice. Far from denying the American charge, it seems to admit even more and to frankly describe an extraordinary exercise of right or power of detention and search.

As to the point in regard to taking vessels into port for search, Sir Edward Grey defends the practice, declaring that "In no other way can the right of search be exercised and but for this practice, it would have to be abandoned altogether." (1) Sir Edward then goes on to contend that after all, the British are but following the precedent laid down by the United States in the Civil War, notably in the case of the Bermuda, (2) to be considered presently.

Our Government has answered the "modern conditions" argument, by the assertion that it has consulted a board of "naval experts" as to the effect of such modern conditions upon the rules governing search at sea. These experts have declared that "at no period in history has it been considered necessary to remove every package of a ship's cargo to establish the character and nature of her trade, or the service on which she is bound," but that "facilities for boarding and inspecting modern ships are in fact greater than in former times," except for a difference in time required. (3)

Referring to the British reminder in case of the Bermuda a British ship condemned by the Federal prize courts for carrying contraband ostensibly to Nassau, New Providence, but in reality to a blockaded port (referred to again under subject of blockade and

(1) Grey to Page International Correspondence X p. 22.

(2) Ibid.

(3) Amer. Note October 21, 1915.





continuous voyages) our Government declares that the case was one of "further proof" - "a proceeding not to determine whether the vessel should be detained and placed in a prize court, but whether the vessel, having been placed in a prize court, should be restored or condemned." (1) That is, we contend that there is a difference between dragging a neutral ship into a belligerent port and there keeping her at expensive delays, merely upon unfounded suspicions as to non-neutral destination and in calling for further evidence after a ship has been found, by search at sea to carry contraband and other suspicious cargo, as was the Bermuda. Moreover, in the latter instance the cause was one of absolute contraband, found on board when the vessel was searched - such things as military blankets and buttons marked C. S. A., swords, etc. - and which any reasonable man had a right to suspect of belligerent destination. In addition, there was involved the question of blockade-running, which did not enter into the cases referred to by the American note. (2)

Sir Edward Grey might with much greater force have pointed to the case of the Springbok, captured under somewhat similar circumstances, one hundred-fifty miles east of Nassau. In this instance, external evidence, in the form of papers taken from blockade-runners captured elsewhere, was introduced to show common ownership and destination. Chief Justice Chase, in giving the opinion of the Court, admitted that such invocation was not "strictly regular" and should be used for further proof under suspicion. He held, however, that the irregularity was not sufficient to counterbalance the other evidences of guilt and justify a reversal of the lower courts' decision. (3)

(1) Amer. Note October 31, 1913.

(2) For arguments of case, 3 Wallace: 558 following.

(3) 3 Wallace: 30-31.





This brings us to a consideration of the kinds of external evidence which the British have made use of. The first of these which called forth a protest from the United States was that which made an increase of United States imports by neutrals adjacent to the enemy, sufficient ground for detention of our ships with such destinations. While a discussion of this phase of the question can scarcely be separated from that of the doctrine of continuous voyages, to be considered later, yet I think we had best note some of the facts here. For instance, the fact that Italy (then a neutral) had placed no embargo upon copper (contraband on Britain's list), together with evidence of vastly increased importation of that commodity, was considered sufficient evidence of enemy destination. Neutral ships, carrying copper to Italy were therefore detained, regardless of evidence of neutral character found on board. (1)

In his note of February 10, 1915 Grey showed how the imports of Denmark and Scandinavia from this country had swelled enormously since the outbreak of the war. That there is some ground for the British argument, is frankly admitted by the New York Evening Post which gives the following figures:

U. S. Merchandise sent to Germany first 8 months 1914 -  
\$156,000,000

U. S. Merchandise sent to Germany first 8 months 1915 -  
11,300,000

But during this latter period of eight months, our exports to Holland, Norway, and Sweden increased by \$114,800,000. (2) A

(1) S.F. Piggot cites Amer. Notes Nov. & Dec. 1914 -  
19th Century, April 1915: 734-5.

(2) New York Evening Post Nov. 6, 1915.



recent British cartoon well illustrates one point of view. Holland and Scandinavia are portrayed as two archins with huge bundles of foodstuffs on their backs. John Bull accosts them thus: "Oh, what's that? Only your luncheons! Why what tremendous appetities you have for such small 'uns! (1)

President Wilson argues, however, that this is "external evidence" and that "such a presumption is too remote from the facts and offers too great opportunity for abuse by belligerents --- To such a rule of legal presumption, my Government cannot accede as it is opposed to those fundamental principles of justice which are the foundation of the jurisprudence of the United States and Great Britain." (2)

Let us offer at this point another quotation which might have come from Grey's own pen:

"Those neutral ports have suddenly been raised from ports of comparative insignificant trade to marts of the first magnitude. (3)

In this latter instance, however, the words are those of Justice Betts, delivered in 1833 in connection with his decision condemning the British vessel, *Stephen Hart*. The ports referred to are Nassau, New Providence; Cardenas, Cuba, and Matamoras, Mexico. The *Stephen Hart* was captured off the coast of Florida, bound for Cardenas, Cuba, from London. She had contraband on board.

Or turn to Seward's letter to Lord Russell concerning the *Peterhoff*, 1832. In very flowery and characteristic language he explains how trade with Matamoras "rose from a petty barter to a commerce that engaged the mercantile activity of Liverpool and London." (4)

(1) Current History March 1913; page 1313.

(2) Amer. Note October 21, 1913. (3) Scott Cases :257

(4) Seward to Lyons Dec. Dec. 1832-3 I 508-9.





It would seem that President Wilson conveniently forgets these instances in his protest to Britain. The British are not slow to remind us of them, either, and it adds somewhat to our present embarrassment. Yet, as some of our students have pointed out, in our Civil War cases, we were dealing with unimportant sea towns, while in our present dispute, it is to independent states of considerable size and population that our exports are going. The British have admitted the difficulties in this latter connection.

"The ports to which the goods are consigned, such as Rotterdam and Copenhagen, have in peace times an important trade, which increases the difficulty of distinguishing between neutral and enemy articles." (1)

Our Government argues that even were it to admit the regularity and legality of introducing such evidence this difficulty and liability to abuse would still remain. The situation is still further complicated by the fact that these small neutral countries quite naturally use more United States goods since the war has cut off their German trade. Certainly, the argument from United States precedent loses considerable weight when we look more deeply into the comparison.

Another cause of American complaint in the matter of evidence is found in the British Order in Council of October 29, 1914. Section III reads: "Conditional contraband shall be liable to capture on board a vessel bound for a neutral port, if the goods are consigned "to order", or if the ship's papers do not show who is the consignee of the goods." (2)

While our merchants and news editorials have had a good

(1) British White Paper Cur. Hist. March 1913: 1102

(2) Int. Cor. X p.10; Am. J. Int. Law-Sup. July, 1913 p.8.



deal to say about this point, our official notes to England have said practically nothing of it. This no doubt is due to the fact that we are somewhat embarrassed by Civil War precedents. The note of October 21 does explain that while our courts have employed bills of "to order" character, yet we have done so only to convict and not to arrest. This is the view that Professor Garner takes in saying (1) that such facts were taken only in connection with other evidence.

Secretary Bryan, however, in his note to Senator Stone (January 20, 1915) admitted that the action of our courts in the past was a source of some embarrassment to us in our present negotiations. "Our tribunals", says Bryan, "have held that the shipment of contraband "to order" is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery." (2)

Mr. Bryan was no doubt thinking of Chief Justice Chase's decision in the case of the Springbok, 1866.

"That some other destination than Nassau was intended may be inferred from the fact that the consignment shown by the bills of lading and manifests was 'to order' or 'assigns' --- such a consignment must be taken as a negation that any sale had been made to anyone at Nassau - - - or had been intended." (3)

While it is true that this was indeed used with other evidence, yet the words of the Chief Justice would seem to indicate that much weight was put upon the nature of the consignment. At least this seemed to be the opinion of the writer of the note to Stone when he said: "This Government cannot therefore consistently

(1) Amer. Jour. Int. Law April 1915; 383.

(2) International Correspondence X 4-5.

(3) 3 Wallace 26-27.





protest against the application of rules which it has in the past, unless they have not been practiced as heretofore." (1)

That the last clause of the Secretary's note is a saving one will be seen more clearly when we come to consider the distinction between absolute and conditional contraband. Be it noted here however, that Chase was speaking of absolute contraband. This fact adds somewhat to the strength of our argument.

The whole dispute over the right and manner of search seems to arise out of the conflict between American and British theories as to the "burden of proof". Our Government maintains that the "onus of proof is on the captor, not on the shipper". (2) Britain, on the other hand would hold the opposite view. Her point of view is excellently illustrated by a recent cartoon in London Punch. Here John Bull is represented as standing guard before Europe. A man with a barrow of merchandise approaches. "Who goes there", challenges John. "Neutral!" "Prove it!" snaps the sturdy sentry. (3)

Or note this statement from Sir Francis Pigott, another English writer:

That doubt favors neutral "has no warrant in common sense, for it puts a premium on neutral traders' ingenuity which has itself given rise to the doctrine of continuous voyages - - - The true criterion of destination must be found in the intention of the neutral purchaser, of which the neutral vendor may be ignorant." (4)

In theory, at least, and usually in practice, American Courts have taken the former view. With two such conflicting theories, we may expect disputes to arise.

(1) Int. Cor. X 6 (underscoring my own) (2) Garner AM.J. Int. Law Apr. 1915; 378 cf. Am. Note O.21,15. (3) Quoted Lit. Dig. Mar. 4, 1916

(4) 19th Century April 1915: 735 357.





## Chapter V.

## CONTRABAND AND CONTINUOUS VOYAGES.

This brings us directly to the big questions of contraband of war and the doctrine of continuous voyages. All merchandise has been classified in the past, in both American and English tribunals, as follows:

(1) "Articles manufactured primarily, and ordinarily used for military purposes in time of war.

(2) "Articles which may and are used for the purposes of war and peace, according to circumstances.

(3) "Articles used exclusively for peaceful purposes.

(4) "Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband. Merchandise of the second class is contraband only when actually destined to the military or naval use of the belligerent, while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." (1)

These are the words of our own Chief Justice Chase, delivered in the case of the *Peterhoff*, 1866. The Chief Justice then went on to discuss the rules governing contraband, in such forceful and clear-cut language that I take the liberty of quoting him here at some length.

"The trade of neutrals with belligerents in the articles not contraband is absolutely free unless interrupted by blockade. Hence, while articles not contraband might be sent to Matamoras and beyond to the rebel region where the communications were not interrupted by blockade," articles of contraband nature "were liable

(1) Scott Cases 760-61.



to capture if ~~there~~ real destination was to a belligerent -- - It is true that even these goods, if really intended for sale in Matamoras, would be free of liability; for contraband may be transported by neutrals to a neutral port, if intended to make a part of its general stock in trade." (1)

It was this general classification that was agreed upon in the Declaration of London, (2) and for which our Government is now contending. Yet, until the Declaration of London or some similar convention is properly ratified, all such classifications depend upon the more or less arbitrary action of the belligerents themselves. Bryan concedes this in his note to Stone, already quoted. He says further: "When neutral, we have stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for liberal lists, according to our concepts of the case." (3)

A contemporary English writer says "therefore, good sense has decreed that the destination of an ship to an enemy port shall be adapted as a practical working factor in its application, at least in the case of conditional contraband. " (4)

Yet, the right to determine what shall be free and what shall be contraband is not entirely unlimited. It "must be in conformity with existing treaties and the generally recognized rules of international law." (5) In other words, it must not be greatly at variance with such precedents as those furnished by Chase in the case of the Peterhoff.

Great Britain's first list of contraband was almost the

- (1) Scott - Cases 730-62; 5 Wallace 54-60.
- (2) Cohen - Declaration of London 90-99.
- (3) Int. Conc. X: 4. (4) Piggott - 19th Cent. Ap. 1915; 375
- (5) Garner: International Law, Ap. 1915: 375.





same as that of the Declaration of London and coming largely within Chase's own classifications. Aeroplanes and other aircraft, which are conditional contraband in the Declaration, are made absolute in the list. The list of conditional contraband included foodstuffs and grains, which we have always put on the free list. (1)

The list of October 29 added to absolute contraband unwrought copper, sulphuric acid, iron pyrites, lead, rubber, all motor vehicles, and many other articles which the Declaration of London classified as conditional or free, while the list of conditional contraband grew at the expense of the free list. (2) A longer list was issued December 23 (3) and on March 11, raw wool, tin, lubricants, hides, etc. were put on the absolute list. (4) Finally, in February, when the German Government commandeered all grain and flour, these were put on the list of absolute contraband. (5) Cotton was not put on the contraband list until August 1915. Indeed, Grey wrote Page, January 7 of that year, that "His Majesty's Government have been most careful not to interfere with cotton and its place on the free list has been scrupulously maintained - - and on every occasion, when questioned on that point, they stated their intention of adhering to this practice." (6)

This was quite in line with English precedent. She had (7) protested against Russia's act in making cotton contraband in 1905. The Declaration of London declared it to be free. For diplomatic reasons, therefore, England let it remain on the free list for a year. She finally placed it on the contraband list, however, upon the ground that it was being used in making explosives. (8) Having

(1) Text order in Council Am. J. Int. Law Sup. IX 9-10.

(2) Ibid 12-13. (3) Ibid 16-17. (4) Ibid 21.

(5) Am. J. Int. Law Apr. 1915 -p.373.

(6) Int. Conc. X. P.21. (7) Nation (N.Y.) Aug. 23, '15: 249

(8) Ibid.



thus seen how thoroughly Britain has made use of her prerogative, or rather her power as a belligerent to make this most comprehensive list of contraband, let us compare it with our own lists of fifty years ago.

Bryan, in his note to Stone, reminds the Senator that the United States has, in the past "placed all articles from which ammunition is manufactured in its contraband list and has declared copper to be among such materials." (1) Furthermore, the Secretary reminds Stone, "in the past the United States has exercised the right of embargo upon exports of any commodity which might aid the enemy's cause." (2) Mr. Bryan is without doubt referring, in this latter case to the action of the United States during the Civil War in empowering our consuls at New York and elsewhere to stop suspicious shipments of carload provisions to the British islands near Confederate ports. (3) Since this is a subject more closely related to that of blockade, we shall consider it in greater detail under that head.

As to classifying foodstuffs as contrabands, I find no instance in our Civil War practice unless the case of the embargo, just mentioned, be so taken. Indeed, the words of Chief Justice Chases quoted above in the clasification of merchandise would seem to be an emphatic denial of any powere to do so. Grey, in defending Britain's act, pleads the peculiar nature of the German system of military control. The Germans have, he asserts, organized "an elaborate machinery" for the purpose of securing foodstuffs from over the sea for the army.

(1) Int. Conc. Nov. 1915 p.5; cf. Scott Cases 760-61.

(2) Ibid p.6.

(3) Ex. Docs. 1862-3. I, 260-64, 293-4.





"Under the circumstances," says Grey, "it would be absurd to give any definite pledge that in cases where the supplies can be proved to be for the use of the enemy, they should be given immunity by the simple expedient of dispatching them to an agent in a neutral port." (1) He goes on to discuss the then recent German act placing all flour and grain under governmental control and points out that the German civil population is largely a mere reserve for the army. Therefore, "The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces of the enemy disappear when the distinction between civil population and the armed forces disappears." (2)

Accepting the classifications of the Declaration of London, therefore, which permits food to be classed as conditional contraband when destined to the armed forces of the enemy, (3) rather than that of Chase, who would make it always free, the English have gone still further and subjected foodstuffs to the same treatment as absolute contraband. Our Government has put itself on record as protesting against this, but it must be admitted that it has been only a half-hearted protest.

The only case of any importance under this act is that of the *Wilhelmina* which, with a cargo of grain and flour, was captured enroute to Hamburg, shortly after the British decree had been issued. There were numerous other questions involved in this case, however, and before the prize court had come to its decision, the British blockade of March 11 changed the whole situation. The final result was that the British compromised the matter by buying the cargo of the *Wilhelmina* themselves. (4) On the face of it, at

(1) Int. Conc. X: 34 (2) Int. Conc. X: 35.

{3} Cohen Declaration of London Art. 24 p. 96

{4} Int. Conc. X: 34.





least, this seems to me like an admission of Britain's lack of power to call foodstuffs intended for civil population absolute contraband.

Leaving the discussion of the determination of contraband, we may say that as to its treatment when once determined, "the two great war doctrines are the right of the neutral trader to trade in contraband and the belligerent nations to seize his cargo." (1)

Since our dispute with Britain seems to be largely one of the treatment of conditional contraband, the whole question naturally merges into one of the application of the doctrine of continuous voyages. "It is absolutely clear, from this remarkable reply (Grey to Page, February 10, quoted above) that this doctrine has become the one principle worth fighting for now, for our national safety depends upon it." (2) Since American protests to Britain as appeared in our discussion of search and evidence seem to converge towards this general head, we are inclined to agree with a part, at least, of this, Sir Francis Piggotts' assertion.

The doctrine of continuous voyages is perhaps no where better defined than in the words of Chief Justice Chase, delivered in the case of the Bermuda, 1865.

"It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment - - - - for that could not break the continuity of the transportation of the cargo. - - - - a transportation from one point to another remains continuous, so long as the intent remains unchanged, no matter what stoppages or transshipments intervene." (3)

(1) Piggott 19th Century Apr. 1915: 745.

(2) Piggott 19th Century Apr. 1915: 745.

(3) 3 Wallace: 553.



The Declaration of London recognizes the doctrine in article 30 to the effect that "It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land." (1)

Both these definitions, if such they may be called, apply only to absolute contraband. The Declaration of London expressly states that conditional contraband shall not be so treated except in the face of conclusive evidence. (2) Chase's classification and description of contraband in the case of the Peterhoff (3) quite plainly meant to set forth such an idea as he did in the case of the Bermuda, just cited. (4)

Let us pause to take a hasty glance at the history of the doctrine of continuous voyage. Sir Francis Piggot, already frequently quoted, credits our own courts with its discovery. It was the American judges, he declares, who "in characteristic and logical manner - - - discovered the doctrine of continuous voyages." (5)

Professor Garner declines to give to the United States the doubtful honor. He says that the French applied the doctrine first in the Crimean War. (6)

Be this as it may, the important thing to observe is that our courts did elaborate upon and make excellent use of the doctrine in such cases as those of the Bermuda, Springbok, Stephen Hart, Peterhoff, Gertrude and scores of others not referred to. While Britain attempted to apply it in the Boer War, the ships seized - Bundesrath, Herzog, and General - were released under Germany's

protest. (7) It is to our own Civil War cases that we find the  
 (1) Cohen Declaration of London p.102. (2) Ibid p.109  
 (3) Ibid p. 39 (4) Cf. Garner - Am.J. Int. Law Ap. 1915  
 pp. 387-90. (5) 19th Century Ap. 1915: 747 - cf. British  
 White Paper - Current His. Mar. '16:1102 (6) Garner - Am.  
 J. Int. Law Ap. '15: 387-8 (7) Ibid.





greatest number of references in diplomatic notes.

By her order in council of October 29, Great Britain extended the doctrine of continuous voyages to apply to conditional contraband. (1) This, as the ordinance admitted, is in direct contradiction to the Declaration of London's stand upon that point. Our own courts, while they may have stretched the point at times, have yet maintained a distinction somewhat parallel to, if not even more emphatic than, that made in the Declaration of London. Said Chase, in the case of the *Peterhoff*, "a large portion of this cargo was of second class" (conditional contraband), "but not proved to be actually destined to belligerent use and cannot therefore, be treated as contraband." (2) Moreover, he went on to say that even absolute contraband, "if really intended for sale in the market of Matamoras, would be free of liability; for contraband may be transported by neutrals to make part of its general stock in trade." (3) The same learned jurist gave an almost identical opinion in the *Springbok* case. (4)

Of Great Britain's conduct in the present war, Professor Garner says, "She is now applying the rule which British prize courts have always repudiated," (5) and he quotes numerous English writers, such as Hall, Westlake, and Bentwich to support his assertion. To these might be added the name of Arthur Cohen. (6) Indeed, these writers even go so far as to deny the legality of the application of continuous voyages to absolute contraband. (7)

Compare this statement from a British White Paper: "We had the right (under Order in Council Oct. 29, 1914) to seize

- (1) Int. Conc. X: 10 (2) Scott Cases 761 (3) Ibid
- (4) 5 Wallace: 25 (5) AM. J. Int. Law Apr. 1915: 391.
- (6) Cohen Declaration of London.
- (7) Quoted Am. J. Int. Law Apr. 1915: 391.



articles of conditional contraband if it could be proved that they were destined for the enemy Government or its armed forces in the cases specified above (consignments to Holland and Denmark "to order" or not under embargo), although they were to be discharged in a neutral port. (1)

We have here set forth, in other words, the claim of legality in the application of the doctrine under discussion to conditional contraband, the authority for such a stand being a municipal act. When we recall that Britain's term "conditional contraband" includes many articles which we have always called free, it is not strange that our Government has protested.

Sir Edward Grey, seeming to admit that his Government has departed somewhat from its earlier proclaimed theories, yet contends that Britain's acts only represent an adaptation of international precedent to "modern conditions". Turning again to "the principle that the burden of proof should always rest upon the captor", he says that such has not been the practical theory and "time alone can show whether the rules there (Declaration of London) laid down will stand the test of modern warfare". (2) From which statement it will be observed that Sir Edward is again deliberately ignoring the distinction made between conditional and absolute contraband "as there laid down" and discussed above.

Another defense brought forward by the British is based upon the alleged irregular conduct of the Germans. Such conduct has placed their own actions within the realms of "necessity" "to protect the belligerents' national safety," (3) is the British contention. This was in reply to our Governments' protest of

(1) Eur. Hist. War. 1916:1102 (2) Int. Conc. X 39-33.

(3) Grey quoted by Pigott -19th Cent. Apr. 1915: 736.





December 26, 1914, that "this Government is reluctantly forced to the conclusion that the presumption of His British Majesty's Government towards neutral ships and cargoes exceeds the manifest necessity of a belligerent and constitutes a restriction upon the rights of American citizens on the high seas which is not justified by the rules of international law". (1)

Mr. Wilson firmly denies that "retaliation and expediency" can give sufficient grounds for the other belligerent to change by municipal statute or ordinance, the recognized principles of international law, so far as innocent neutrals are concerned. (2)

Indeed it is almost amusing were it not for the bitter tragedy involved, to observe with what consistency the English mind refuses to recognize our views of neutrality. John Bull, full of his own troubles and miseries, cannot understand how we, as a Government, can blind our eyes to the fact that he and his allies are all right and Germany and hers are all wrong. He sees us quibbling over mere technicalities, "while the Allies are fighting for all that they and Americans hold sacred". In such a situation, the United States argues that it "possesses a general right to enjoy its international trade, free from unusual and arbitrary limitations". (3) To them we seem practically to "demand that Great Britain and her allies should divest themselves of a very large part of the advantages they derive in this war from their superior naval force. And we find it almost inconceivable that any responsible American statesman is likely to press a point that will so inevitably militate to the advantage of Germany." (4)

They argue that the United States suffers far less now  
 (1) Nation (N.Y.) July 1, 1915: 5 (2) Ibid Nov. 13, 1915  
 Cur. Hist. Dec. 1915: 485 - Am. Note Oct. 21 - (3) London Times  
 Nov. 8, 1915 Editorial Page (4) Muirhead in Nation (N. Y.)  
 Dec. 2, 1915: 646.





than did England in the Civil War and that Britain then acquiesced in our policy even when we went beyond what she considered our rights as a belligerent. (1) And indeed, if we come back to the matter of contraband and continuous voyage once more, we must very nearly admit there is some truth, whether it be sound argument or not, in the British contention. For, while Westlake and the other prominent writers of international law quoted above, would seem to protest against American practice in the matter of continuous voyages, yet, in reference to absolute contraband, at least, the English Government cannot be said to have completely denied that principle in 1861-1863. Let us quote at length from Lord Russell's reply to the complaint of the owners of the Peterhoff.

"The Government of the United States has clearly no right to seize British vessels bona fide bound from this country to the ports of Vera Cruz or Matamoras, unless such vessels attempt to touch at, or having an immediate or contingent destination to, some blockaded port or place or are carriers of contraband of war, destined for the Confederate States; and in any admitted case of such unlawful capture, Her Majesty's Government however cannot, without violating the rules of international law, claim for the British vessels navigating between these places any general exemption from the belligerent right of visitation and search by the cruisers of the United States; nor can they proceed upon any general assumption that such vessels may not so act as to render their capture lawful and justifiable. Nothing is more common than for those who contemplate a breach of blockade or the carriage of contraband, to disguise their purpose by a simulated destination, and by deceptive papers; and the situation of the ports on the coast of Mexico with

(1) London Times Nov. 8, 1915 Editorial Page.



reference to the Confederate States is such as to make it not only possible, but in many cases probable, that an ostensible Mexican destination would be resorted to as a cover for objects which would really justify capture. It is the right of belligerents to capture all vessels, reasonably suspected of either of these transgressions of international law and whenever any such case of capture is alleged the case cannot be withdrawn from the consideration of the prize court of the capture. - - - Her Majesty's Government cannot, upon ex parte statements, deny the belligerents in this war the exercise of those rights which in all wars in which Great Britain has been concerned, she has claimed herself to exercise." (1)

Certainly, this sounds almost as fair a statement of the American side of the affair as Seward himself could have advanced. It would even seem that Russell is admitting the general principle underlying the doctrine of continuous voyages. Americans may contend, on the other hand, that the address of the noble lord indicates that a vessel can be detained, as in the case of the Peterhoff, only under suspicion warranting her trial before a prize court. She was not taken into port for search for suspicious evidence. She had been examined at sea, and taken before the court for further proof of innocence or guilt. (2)

The address of Lord Russell is of interest, in addition to the points indicated. In the first place, it would seem to reflect somewhat upon our present criticisms of the British prize courts as expressed in the October note. Secondly, the above letter was considered to be a warning to deceitful shippers of the time and was referred to (together with a similar address by Russell to the

(1) Ex. Docs. 1863-64 I 339-30.  
 (2) Ex. Docs. Chapter iv.





Liverpool merchants) in the case of the Springbok as evidence against the defendants. (1) & (3)

We are not unable, of course, to find instances of British complaint against our prize court procedure. For example, in the British protest against the seizure of the Labuan 1832, Lord Russell complains that "Mr. Seward - - - declines to order her release, but insists that the case be left to the distant and uncertain result of proceedings before a prize court." (3) It must be admitted, however, that in this instance there was considerable ground for complaint, the Labuan being held upon the rather flimsy suspicion "not unfairly attaching to all vessels sailing under the British colors in the neighborhood where she was taken." (4) In passing, we might suggest that it looks as though Seward in this instance was getting perilously near the present British theory as to "burden of proof".

In general we may say, however, that the British did not at least acquiesce in our practice of that period. We may say, too, that so far as absolute contraband is concerned, if we accept Britain's lists we cannot, and be consistent, register any great complaint, except it be in the manner of the British practice. If we accept her view of the effect of modern conditions and necessity we might even admit the exception. There would still remain, however, the big question of the application of the doctrine of continuous voyages to conditional contraband - meaning by the expression 'conditional contraband' the elaborate list that Britain has presented. We could not well consent to this, I think, as we

- (1) 5 Wallace 24.
- (2) Ex. Docs. 1832-3 I 171-2.
- (3) Ex. Docs. 1832-3 I 80
- (4) Ibid; 81.



should thereby be ignoring the very point of distinction between conditional and absolute contraband. Were we to admit the legality of British action in this respect, we should be neglecting our duty as protectors of the rights of our traders and shippers on the high seas. President Wilson has coupled the question with that of search and evidence and has put our Government on record as protesting the British action. It is well to keep these protests in mind.



## Chapter VI.

## BLOCKADE AND CONTINUOUS VOYAGE.

The whole question of contraband has for the present assumed much less practical importance since March 1, 1915, for on that date, Britain's "so-called" blockade of Germany was announced to have begun. The contraband question still remains, it is true, but we hear little of it. Blockade and search are the two big problems before us now.

Without going deeply into the origin and history of the principle of the blockade, it may be said that "In order to determine what characterizes a blockaded port, that denomination is given only where there is, by disposition of the power which attacks it with ships stationary or sufficiently near, an evident danger in entering." (2) This is, as will be remarked, evidently an attempt at interpretation of the fourth clause of the Declaration of Paris. that a blockade, to be binding, must be effective. The various rules, such as public notification, presumption of knowledge of existence, penalty to blockade-runners, which international custom has attempted to establish concerning the conduct of blockade will best be illustrated by the discussion following of our lengthy controversies between our Government and Great Britain, both now and in the past.

It should be understood that blockade is an extreme measure, aimed to stop not only contraband, but all sea borne trade with the enemy. (3) When we come to ask whether blockade can be extended to include all trade, both land and sea - whether, in short, the doctrine of continuous voyages can be applied to blockade - we at once get into all sorts of difficulties, as we shall see.

(1) Brit. W. Paper - Cur. Hist. Mr. 1913:1103 (2) Conv. 1801 between Eng. and Russia 19th Cent. (3) Garner MS on Blockade p.36





Let us come at once to the establishment of Britain's "so-called" blockade of Germany. Following Germany's declaration of a "war zone" about the British Isles and France in February, 1915, the British Government declared itself "therefore driven to frame retaliatory measures in order in their turn to prevent commodities of any kind from reaching or leaving Germany. They (Britain and France) will therefore hold themselves free to detain and take into port, ships carrying goods of presumed enemy destination, ownership or origin. It is not intended to confiscate such vessels or cargoes unless they would be otherwise liable to condemnation. (1) It will be observed that the term "blockade" is not used in the note at all.

On March 5, Secretary Bryan dispatched a reply to the above note to the following effect:

"The first sentence (of the British notice) claims a right pertaining to a state of blockade. The last sentence proposes a treatment of ships and cargoes as though no blockade existed. (That is, they are not to be confiscated). The two together present a proposed course of action previously unknown to international law - - - - What is to be done with a cargo of non-contraband or conditional contraband detained under the declaration?" (2)

The order in council which fully explained the British intentions in this respect was received by our State Department a few days later. In substance it was as follows:

" All merchant ships setting sail for German ports after March 1, 1915 were to be detained unless they had a pass to neutral or allied ports. Her goods, if not liable to condemnation as

(1) Amb. Rice to Bryan -Int. Conc. X: 39-40.  
 (2) International Correspondence pp. 40-41.



contraband, were either to be requisitioned by the Allied Governments or returned. (An answer to Bryan's question, it would seem.)

(3) Concerning goods similarly shipped from German ports these were to be discharged in British or Allied ports, there to be requisitioned or sold, no money to be paid out until the end of the war, however, "unless it be shown that the goods had become neutral property before the issue of this order. "

(3) "Every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port (German or neutral, that is) carrying goods with an enemy destination or which are enemy property, may be required to discharge such goods in a British or Allied port, "there to be turned over to a prize court, and to be restored to the person entitled thereto - - unless they be either contraband or requisitioned."

(4) Goods from non-German ports, of enemy origin or property "may be required to discharge such goods in a British or allied port" to be turned over to a prize court for requisition or sale, the proceeds to "be paid into the court and dealt with in such manner as the court may in the circumstances deem to be just."

(3) Provision is made for claimants to issue writs for immediate release on bond.

(3) Declares a ship billed for a neutral port and changed to enemy port liable to condemnation. (1)

Should we accept this order in council as establishing a legal blockade, I think that we may say that, precedent or no, here - - - especially in sections three and four - - we have the theory of continuous voyages stretched beyond a point which our courts have never approached. With it is the promise of non-confiscation of

(1) Text in Int. Conc. X. 45-46.





of blockade runners, the denial of a right which we have freely exercised in our Civil War. (1)

Just here, however, is where President Wilson has caught the main point of the protest. He refuses to recognize a state of blockade to exist at all. The order in council of May 15 says the American reply of March 30 "would constitute, were its provisions to be adequately carried into effect, a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area and an almost unqualified denial of the sovereign rights of the nations now at peace." (2)

Our Government therefore denies the existence of a legal blockade at all. (3) Mr. Wilson concedes that modern conditions may in some measure affect the conduct of a blockade, (4) but he denies very emphatically that Britain can virtually blockade neutral ports under mere suspicion that such ports were serving as gateways for German commerce. Therefore, "in circumstances which have developed, it (the United States Government) feels that it can no longer permit the validity of the alleged blockade to go unchallenged." (5)

The grounds upon which our Government has based this protest have already been intimated, but let them be repeated and summarized here.

(1) The order in council of March 15 is not really in the form of an announcement of blockade, it did not lay down rules for its presumed knowledge, or define the area blockaded, according to recognized principles such as those set forth in the Declaration

(1) Ex. Docs. 1862-3, I 238-9 (Seward to Lyons)

(2) Inter. Conc. X p. 47. (3) Amer. Note Oct. 31, 1915.

(3) Ibid (4) Ibid (5) Garner MS. On Blockade p. 2-3.



of London. (1)

(2) It would seem that "The novel and quite unprecedented feature of the blockade is that it embraces many neutral ports and coasts, bars access to them and subjects all neutral ships seeking to approach them, to the same suspicion that would attach to them were they bound for the ports of the enemies of Great Britain. (2)

(3) The non-confiscation clause is irregular.

(4) All these irregularities are justified upon the grounds, first as a retaliatory act against Germany's alleged violations of the laws of war, and secondly "In their desire to alleviate the burden which the existence of a state of war at sea must inevitably impose on neutral sea-borne commerce, they declare their intention to refrain altogether from the exercise of the right to confiscate ships or cargoes which belligerents have always claimed in respect of breaches of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory." (3)

It will be seen that our objections to the blockade are largely technical, therefore, rather than practical. The most serious objection is the second which I have enumerated. The others might offer no practical difficulties but might even, as Grey has asserted, react to the benefit of neutrals.

For in spite of the fact that the term blockade is not used in the order in council it is quite evident that it was the intention of the British to impose one. All the correspondence

(1) Garner MS. on "Blockade" p. 2-3. (2) Ibid.

(3) Grey to Page - quoted by Garner MS. Blockade p.6 -text of note Int.Conc. X P 28. The American assertion that the blockade does not bear with equal severity upon all neutrals has lost force since British submarines have apparently closed the German - Scandinavian trade.





since that date clearly indicates as much. The question as to whether our Governments' stand can be justified may well rest for a moment while we consider, for sake of historical comparison, approximately parallel points at issue in connection with our blockade of 1861-1865.

On April 19, 1861, the President of the United States issued a proclamation of blockade which was published in both America and foreign countries. This first proclamation included the ports of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. The first three paragraphs recite the reasons for such a step, namely: Inability to enforce customs laws in those states, threats of those states to issue letters of marque and reprisal and a previous warning to the insurrectionists to disperse.

The proclamation then went on to state the intention of the President, in lieu of Congressional action, "to set on foot a blockade of the ports within the States aforesaid, in persuance of the laws of the United States and the law of the nations in such case provided. For this purpose, a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave either of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo, as prize, as may be deemed advisable." (1)

(1) Nicoley & May -Abraham Lincoln VI 248-50.





Another paragraph proclaimed that all ships molesting United States vessels "under pretended authority of the said states" to be pirates.

A proclamation of April 27, extended the blockade to include the states of Virginia and North Carolina. (1)

Two things or points of difference between the proclamations of 1861 and the British order in council of 1915 stand out. First, the blockade is regularly established as a blockade under the rules of international law and is to be enforced according to such law, not by municipal ordinance. Second, and resulting from the first, vessels and cargoes attempting to violate the American blockade are to be subject to confiscation.

The question arises in our minds at once as to whether the British forbearance in the latter instance affects the technical irregularity of their conduct in the first instance. While I personally and as a very matter of fact critic rather than one who speaks from a breadth of knowledge of the subject believe that it does, I wish to let the question rest while we consider the common points of the two blockades.

It will be remembered that the Declaration of Paris declares that a blockade, to be legal, must be effective. That is the one great essential, according to the Declaration. How do the two blockades under discussion compare in this respect?

Our Government has complained that ~~that~~ the effectiveness of the present British blockade depends largely upon the fact that it has been extended to include neutral ports, (2) a point which I have already mentioned. (3) Yet, the British blockade is probably

(1) Nicoley & Hay - Abraham Lincoln VI 348-50.

(2) Amer. Note Oct. 21

(3) Page 41



as effective as any modern blockade can be (1) or indeed as our Civil War blockade was. Its extension involves the question of continuous voyage and the closely related one of embargoes.

As to the effectiveness of our Civil War blockade, let us take note of a few temporary remarks upon the subject. In May 1862, we discover that our minister, Charles Francis Adams is "profoundly concerned at the inefficacy of the laws of Great Britain in which a large proportion of the undertakings (to run blockade) originate, to apply any adequate policy of prevention," (2) and he urges the strengthening of British statutes to prevent blockade running. Certainly, a blockade that needed such aid could not have been perfect in its effectiveness. In deed, we cannot but see some justice in Lord Russell's earlier remarks on this blockade, which "kept up irregularly, has when enforced, seriously injured the trade and manufactures of the United Kingdom. Yet Her Majesty's Government have never sought to take advantage of the obvious imperfections of the blockade to declare it ineffective", but "The United States Government cannot expect that Great Britain should frame new statutes to aid the federal blockade, the application of which it is their duty to confine within the limits of international law." (3)

The last phrase brings in the matter of extension of blockade, and we are again struck by the resemblance in the two situations.

Just at present we are asserting that "The United States maintains the right to sell goods (evidently free goods are inferred) into the general stock of a neutral country (4) and denounces as

(1) Garner MS on "Blockade" p. 30 (2) Ex. Docs. 1862-3 I, 85.

(3) Ex. Docs. 1862-3: 84-85.

(4) Cf. Chase -5 Wallace p. 25





illegal and unjustifiable, any attempt of a belligerent to interfere with that right on the ground that it suspects that the previous supply of such goods in the neutral country, which the imports renew or replace, has been sold to the enemy." (1) "Moreover, even if the goods listed as conditional contraband are destined to an enemy country through a neutral country, that fact is not in itself sufficient to justify their seizure." (2) Britain has also arranged "to create in these neutral countries, special consignees or consignment corporations with power to refuse shipments and to determine when the state of the country's resources require the importation of neutral commodities." (3) (The reference is, of course, to Britains' enforced embargo upon the shipments of neighboring neutrals to Germany.)

We complain, in other words, that Britains' blockade unfairly effects neutrals - - that the doctrine of continuous voyage has been extended beyond all precedent and the Declaration of London and that "bona fide trade with neutral countries is greatly reduced as a consequence." (4) Finally, we protest against the manner in which the British have applied the disputed doctrine, that is, to land transshipments. (5)

Let us consider first the claim to the right to sell goods into the common stock of a neutral country, even though other goods are thereby released for enemy use. This would certainly seem reasonable enough, since our Government has, theoretically at least, denied the existence of a blockade at all. Indeed, it seems strange that our Government should make the distinction between goods sent in and goods released, for if no blockade exists, have we not a right to sell any free goods directly to the enemy?

(1) Am. Note Oct. 21 (2) Ibid. (3) Ibid (4) Ibid

(5) Bryan to Page - Int. Conc. X p. 48.



Certainly we may sell them through a neutral port. Are we not, in making this guarded distinction, admitting the existence of a blockade? If it is basing its contention on Civil War precedents, there can scarcely be any analogy unless the blockade is admitted. Yet, the very words, "to sell goods into the general stock of a neutral country" seem a reminder of those of Chief Justice Chase in the case of the Springbok. This was a case of blockade-running, (1) Chase declaring "If the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common stock of the island, it must be restored." (2)

If our Government recognizes the existence of a blockade, it would seem that the point made by President Wilson is possibly well taken. He seems to intimate that if the goods sold, rather than those replaced, were to be passed on to the enemy, then the doctrine of continuous voyages would apply as it did in the case of the Springbok. If there is no blockade, however, why make the distinction?

In the very next paragraph, the President does get back to what might be the "non-blockade" theory. He claims the right to pass conditional contraband through neutral territory to the enemy. This protest would have some weight, no matter whether we consider it under the rules of blockade or those of contraband. Conditional contraband, to be subject to seizure, must be proved to be actually destined for the use of the armed forces of the enemy. Both the Declaration of London and the words of Chief Justice Chase would

(1) The Amer. Note of Oct. 21 doubts whether this was a case of blockade-running or contraband, and yet the court expressly states that the character of the cargo was ascertained only as a clue to destination to a blockade port.

(2) 5 Wallace 25.





indicate this much. (1) This is only another way of saying, generally, that the theory of continuous voyages does not apply to conditional contraband. The two ideas are contradictory to each other, as we pointed out above. (2)

If, on the other hand, we concede a blockade to be existent, we still have some argument and precedent on our side. For our courts held, in the case of the *Peterhoff*, that transshipments by land as opposed to transshipments by sea, break the continuity of the voyage. Basing his decision upon English precedent, Chase concluded "These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation." (3)

So far as such precedents count, therefore, it would seem that we are upon more or less firm ground, no matter which view we take in this instance. If there is no blockade, then of course all free goods may go to the enemy by way of neutrals and there is at least considerable doubt that the same cannot be said of conditional contraband. If there is a blockade, the contraband laws of course remain the same and our precedents say that free goods may be transported by land to the enemy. As to the last point, we cannot help seeing some justice in the British plea that "times have changed." Chase was making his decision when the railroad facilities between Matamoras, Mexico and the rebel states were practically nil. In the present instance, Grey points out that Germanys' neutral neighbors offer land transshipment to the interior often more cheaply than by sea. The distinction therefore becomes ridiculous, he would say. (4) To admit the distinction would be to

(1) Cohen Declaration of London 109; Scott-cases 760-761  
Cf. Garner Am.J. Int. Law Apr. 15, 1915: 387-90 (2) See page 30  
(3) 5 Wallace, 37. (4) Grey to Page Int. Conc. X 28.





say that only island countries such as England can be blockaded at all. (1) But there again, we have the Englishman arguing upon the extent of the blockade, while the American, theoretically, at least, refuses to admit the existence of the blockade. Certainly, I should say, to admit the American point of view would give us the more practical argument, in this instance at least.

We come to the question of the right of a belligerent to enforce embargoes upon neutrals. The British Government, not content with the power of stopping suspicious cargoes at sea, has adopted the plan of compelling Holland and other adjacent neutrals to guarantee the non-exportation to Germany of any goods whatsoever (with a few unimportant exception). Confronted by the English fleet and the threat to cut off all their trade, these countries had no alternative but to comply with the British demands. (2) As a result, "Vessels have been held until they have reconsigned their cargoes to a consignee in a neutral country designated by the British Governmen." (3) If we are again to fall back upon precedent, we may safely say that we never did such a thing as this - for obvious reasons. The only near neutrals were Mexico and Canada. The former would have been unable to comply because she was in the throes of civil war herself. Canada happened to be under the protection of the British Government and the British Government was not to be overawed by our comparatively small navy, as are Denmark and Holland by the powerful fleets of the Allies. We had to content ourselves, therefore, with the protest quoted above, (page 45) that Great Britain should change her statutes to

(1) Nation Dec. 2, 1915: 646.

(2) Am. Note Oct. 21; S.F. Piggott -19th Cent. Ap. 1915:745.

(3) Appendix Amer. Note Oct. 21.



help us maintain our blockade , and with an embargo upon our own trade with the British West Indies and Bahamas. The latter step was taken early in 1862 and under authority of a Congressional act. (1) The act called forth the following protest from the British Government. It protested "that her commerce should not be interrupted except upon the principles which ordinarily apply to neutrals. These principles authorize nothing more than a strict and actual blockade of the enemys' ports by such force as shall, at the least, make it evidently dangerous to attempt to enter them. - - - Her Majesty's Government consider it would be introducing a novel and dangerous principle into the law of the nations if the belligerent, instead of maintaining an effectual blockade, were to be allowed, upon mere suspicion or belief, well or ill-founded, that certain merchandize could ultimately find its way to the enemy's country, to cut off all commerce between their commercial allies and themselves." (2)

But change a few names and terms and we might almost believe we were reading from the American note of 1915. It may be objected that there is a great deal of difference between an embargo of one's own ports and in a blockade of neutral ports. To which we may concede a "perhaps", but so far as the question of the extension of blockade is concerned, that is about all that we may fairly concede. Furthermore, let us continually bear in mind the difference in relative power of the Governments concerned. When we do this, it seems to me that Britain almost has the favorable side of the comparison. I am thinking particularly of that non-confiscation of blockade-runners clause. Holding in her mighty navy the power that

(1) Dip. Corr. 1865: 3; Ex. Docs. 1862-3 I 489.

(2) Ex. Docs. 1862-3 I; 294-5.







she has, it seems to me that Britain has been much fairer and more conciliatory, more mindful of that elusive thing termed international law, than might have been the case with us fifty years ago.

Indeed, I cannot but almost agree with the gist of the assertion from an English daily in urging a stricter blockade: "The practical grievances of the United States from our blockade appear to be negligible, but their legal case is strong." (1)

That is, Britain's blockade has not followed the dictates of international law in every detail, but is dependent upon a municipal ordinance for its application. Aside from these technical irregularities, I think that we must agree with Professor Garner that "If this is not recognized as an effective blockade, blockade under modern conditions is impossible." (1)

I am aware that there are many who do not accept this view. Professor Hart of Harvard, for example, has launched some of the most extreme criticisms against the British measures. (2) There is no doubt that the British have overstepped their rights as belligerents and our Government has very properly protested. The point I am endeavoring to make, however, is this: With far greater power in their hands than we had in the Civil War, the British have refrained from committing acts, such as confiscating blockade-runners, which we either did or tried to do in the Civil War.

Another point which is worthy of note is the striking contrast between the correspondence of the two periods under discussion. Take, for example, the British note of February 10, 1915. This note is frankly conciliatory and is framed in the most cordial

(1) Manchester Gaurdian quoted Lit. Digest Mar. 4, 1916.

(2) Garner MS. on "Blockade": 30

(3) See Current History, Apr. 1916; Hart on "Freedom of the Seas".



manner. In it is "an evidently sincere desire manifested to interfere as little as possible with legitimate neutral trade and to reduce to a minimum the hardships to which neutrals were subjected in consequence of the Allied measures." (1) Or examine the most recent British note of April 23 concerning the coalition of neutrals to protect the rights of neutral powers. On the American side, the note of October 21, while firm in tone, is nevertheless courteous and conciliatory.

When we turn to the notes of Seward, on the other hand, we find a marked contrast. Seward, at times, seemed to be bent upon causing a break between America and England, so violent and threatening were some of his notes. The exchange of notes over the Trent Affair might easily have led to war between Britain and America had there been a cable to insure rapid transmission of them. Or turn to the rash note of July 11, 1863, in which Seward told Adams that if English harbors continued to offer refuge to Confederate cruisers, "The navy of the United States will receive instructions to pursue these enemies into the ports which thus, in violation of the law of nations and the obligations of neutrality, become harbors of pirates." (2)

Fortunately, one of the ablest diplomats that our country has produced, Charles Francis Adams, was at the English court and he wisely took upon himself the responsibility of refusing to lay the note before the British Government. When it finally came out the following spring it created a storm in Parliament. (3) As early

(1) Garner MS. "Blockade": 24

(2) Ex. Docs. 1863-4, I: 356.

(3) Dip. Corr. 1864-5, I: 166-7.





as May 21, 1861, one of Seward's dispatches to Adams coolly discussed the possibilities and even probabilities of a war with Britain. (1) This time Lincoln used his blue pencil in time. (2)

One more illustration, this time from Lord Lyons, though perhaps of Palmerston's authorship, should be considered. The note says that there is the impression in England that the United States "by capture, by wanton imprisonment of the masters and part of the crew of the captured vessels to put a stop to the British trade to Matamoras altogether - - - It is obvious that Great Britain must interfere to protect her flag." (3)

Let me repeat that in the correspondence and in the conduct of the parties involved today, there is much that betokens well for the recognition of neutral rights and international law. When we hear Sir Edward Grey telling the House of Commons that the present blockade must be carried on "consistently with the right of neutrals and we must let through bona fide vessels for neutral ports", we cannot but feel hopeful. We may even wonder whether if we had in our hands the comparative power which Britain holds to-day, we should have taken the trouble to justify every questionable action upon the grounds of international law. That Britain does is, as I say, a hopeful sign.

(1) Nicholay and Hay, Lincoln, VI 277-23.

(2) Ibid.

(3) Ex. Docs. 1862-3 I: 396.



## Chapter VII.

### CONCLUSIONS.

To summarize, the situation as it now stands (April of 1916) we can best quote, for the British point of view, from a recent British White Paper: (1)

"The state of things produced is, in effect, a blockade, adapted to the conditions of modern warfare and commerce, with the only difference being that the goods seized are not necessarily confiscated - - - Once their destination or origin is established, the power to stop them is complete.

"Our contraband rights, however, remain unaffected, although they, too, depend upon the ability to prove enemy destination.

"That our blockade prevents any commodities from reaching Germany is not, and under the geographical conditions, cannot, be true. But it is already successful to a degree which good judges both here and in Germany thought impossible and its efficiency is growing day by day. It is right to add that these results have been obtained without any serious friction with any neutral Government." (Alas for Mr. Wilson's industry!)

For the American side of the question I have already quoted extensively from the American note of October 31, 1915. It is here that our Government declares that the "so-called" blockade of the British is "ineffective, illegal, and indefensible" and "this country will henceforth protest every case of capture under the so-called blockade. The British methods of obtaining evidence as

(1) Cur. Hist. Mar. 1916. 1102-3.





to contraband are, as has been discussed, declared illegal. Their prize courts are attacked. Embarrassed no doubt by our own precedents, we have seen Britain's list of contraband swelled without any protest from our Government. (1) Finally, there is our own (by use if not by discovery) doctrine of continuous voyages running through all three of the big issues which this thesis has endeavored to comprehend. Our Government would maintain that the British have "out-Chased Chase", as it were.

Let us review briefly these several issues in the order in the order in which they have been treated in order to draw our conclusions.

In the matter of search at sea we have seen that our own skirts are fairly clear to give force to our protest. In the past, we made at least the most of our searches at sea. Yet, it does not seem to me that the British are wandering from the practical application of the American theory when they plead "modern conditions" to justify their taking of vessels into port for search. The chief difficulty seems to be that the point involves that of long delays and damaged cargoes. Many innocent vessels have been kept in port for days, while their destructible cargoes spoiled. The case of the Chicago meat packers is especially notorious. (2) And yet the British have shown a remarkable willingness to reimburse owners of such cargoes, the case just mentioned having been recently (3) (April 26, 1916) finally settled. The complaints in this matter of delays are far from being new, as may be observed from even a casual perusal of our Civil War correspondence. The case of the Sunbeam is to the point. This British vessel was hit by a gale while on the way to Matamoras and was blown into Wilmington, North Carolina, (1) Bryan to Stone, Int. Conc. X p. 5. (2) Current Dailies Oct.-Nov. '15 (3) Chicago Tribune April 26, p. 1.



where a Blockader captured her and sent her to a New York prize court. Her crew filed a long complaint of improper treatment, delay, damage, etc. and declared that attempts had been made to persuade them to enlist in the federal navy. (1)

The Orion suffered a similar experience and was the occasion of a similar protest from Britain. (2)

There are many cases in dispute today, however, which cannot be justified nor excused under plea of necessity or remuneration for damages. If the British insist upon taking vessels into port for search, they must provide adequate means to hasten that search and to cause no more delay than if it were made at sea. Nor can the mere suspicion that hidden away somewhere in the center of a cotton bale there is a piece of copper or rubber, (3) justify in the average American mind, long delays and the unloading of an entire cargo. It seems unreasonable, too, that a certificate from a British consul as to the innocence of cargo and destination should not be recognized, as sufficient to establish such innocence. Indeed, it seems to me that if some arrangement could be made by which both British and American consuls would inspect both manifests and cargoes, the whole question of search and delays would be reduced to a minimum.

As to the question of kinds of evidence and manner of obtaining it, we have seen that unless it be in quantity, the British offense is scarcely different from ours of the past. I am constrained to refer, for example, to Seward's reply to the British complaint concerning the Labuan. Seward explained that the vessel had become involved in a suspicion not unfairly attaching to all

(1) Ex. Docs. 1863-4, I: 450-5. (2) Ibid -1862-3, I: 464.

(3) Nation July 1, 1913.





vessels sailing under the British colors in the neighborhood of the place where she was taken." (1) If the British have any sense of humor left they might readily seize upon this very quotation to apply to their conduct towards all neutral vessels found in the English channel and the North Sea.

Nevertheless, where neutral vessels are held for long periods of time on mere suspicion, while outside evidence is sought everywhere, I do not see how the British can justify their conduct. It is again going upon the theory that the burden of proof rests upon the captive, rather than the captor - that a ship or cargo is guilty until found innocent. This is entirely contrary to American thinking in matters criminal and to us it seems equally unjust in matters of contraband and blockade. The British theory has resulted in long delays of innocent cargoes for the sake of the guilty few. We cannot accept that theory and be consistent. This point might also become unimportant, however, if the plan of consular inspection be adopted as suggested.

In matters of contraband, the question seems to depend largely upon whether we accept Britain's classifications. We have apparently done so. The whole matter then becomes of the distinction between conditional and absolute contraband, with reference to the application of the doctrine of continuous voyages. Here, I think, is our surest ground, for both precedent and authority seem largely upon our side. Our own courts, the Declaration of London and its commentators seem fairly well agreed that conditional contraband is outside the application of the doctrine. To apply it would admit dangerous opportunities for abuse. Moreover, Britain's sole authority for such application is a municipal ordinance as

(1) Ex. Docs. I 1832-3: 81.





opposed to international law and custom. So much, Sir Edward Grey, has himself admitted, and his explanation that cases might be appealed to the Privy Council or a board of arbitration comprises what the (1) Nation calls "virtually a confession with a weak show of avoidance". If we are going to distinguish at all between conditional and absolute contraband, I do not see how Britain's application of the doctrine of continuous voyages can be justified, although we may well appreciate her predicament.

But, as I have said, except for the few cases against which our Government has protested, the question of contraband has become insignificant in comparison with that of blockade. The blockade I have already fully discussed. I think that for all practical purposes, we must admit the legality of the British blockade in proportion to its efficiency. It has of late been conducted with a frankness and a fairness which are commendable. The British have confiscated few, if any, cargoes for mere breach of blockade and have shown themselves ready to reimburse our merchants for losses through delays. I must repeat that while I would not venture to take exception to Mr. Wilson's or Mr. Bryan's authority in citing this non-confiscation clause as being opposed to the technical rules of blockade, yet I cannot see how, practically, we can contend such a point. To confiscate such cargoes would only add to the friction between the two Governments, and Great Britain plainly wishes to avoid that. Let us not go looking for further trouble, therefore, but admit that with the exception of certain specific and irreparable abuses, the present blockade is as affective and legal as was ours of the Civil War, or as any modern blockade can be.

The question of continuous voyages and blockade remains.  
(1) Nation Aug. 12, 1913: 103.



Having assumed the blockade to be legal, it is interesting to note the resemblance between British and American applications of the doctrine. The chief point of difference lies in our contention that land reshipment breaks the continuity of the voyage to blockaded regions. It is doubtful whether this distinction will seem important or even reasonable, to American practical minds.

The fact that Britain has employed the forced embargo and other especially irritating measures to aid her in the application of the doctrine, is not so much more original than our own embargo of the Bahama trade as we have seen.

Viewing the whole question, therefore, in a perfectly unprejudiced and practical frame of mind, and with the facts of geographic relations as pointed out in an earlier chapter well in mind, I think we must agree with Professor Garner that, "If the right of blockade is to be maintained, the application of the doctrine of continuous voyages to blockade-running must be permitted; otherwise the right will, in many cases be largely worthless." (1)

This is not vastly different from Sir Edward Grey's recent declaration, "If - - - the answer is that we are not entitled to interrupt trade with the enemy through neutral countries, I must say definitely that if neutral countries were to take that line, it is a departure from neutrality." (2)

"In the matter of blockade, in the manner of seizure of contraband, we ourselves stretched the preexisting understandings of international law during our Civil War; if England has now stretched them more and with less justification, that is a ground for very determined objections on our part, but it is not a new thing under the sun." (3)

(1) Garner MS. "Blockade" p.33. (2) Lon. Daily Chron. quoted in Lit. Digest Mar. 4, 18:553 (3) Nation Sept. 23, 1913:373





In all wars, belligerents seek to exalt their Powers, while as neutrals they protest at similar conduct on the part of others. It looks like "an eternal see-saw," but always there is slowly emerging "a definitely ascertained set of rules by which nations shall be guided." (1) If, in this present war, international law seems a myth, let it be recalled that out of every great war, international law and recognition of the rights of humanity, have climbed to greater heights. The very fact that people are reading of the questions at issue is a wonderfully good omen.

When the guns of Europe have ceased to roar and the exhausted powers gather about the council table, then must international law and civilization come into their own. Then, too, will the scholarly, but much ridiculed "notes" of President Wilson most surely be brought forth, and America will have played her part in the great cause of humanity and civilization.

(1) Nation Sept. 23, 1915: 373.







UNIVERSITY OF ILLINOIS-URBANA



3 0112 086831523